Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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85-290

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA J. RAYNER, for herself, and minor children BENTON S. RAYNER, CHRISTOPHER S. RAYNER, and BRUCE S. RAYNER, as widow and surviving children of SGT. BENTON WARD RAYNER, JR.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a medical malpractice action under the Federal Tort Claims Act is barred by the *Feres* Doctrine of Sovereign Immunity regardless of the duty status of the injured party at the time of the malpractice, if the injured party was an active duty member of the military at the time.

LIST OF INTERESTED PARTIES

The following persons, firms, partnerships, and corporations, have an interest in the outcome of this case:

1. Honorable J. Robert Elliott (Trial Judge)
2. Brenda J. Rayner (Petitioner)
3. Benton S. Rayner (Petitioner—Minor Child)
4. Christopher S. Rayner (Petitioner—Minor Child)
5. Bruce S. Rayner (Petitioner—Minor Child)
6. Jerry D. Sanders (Attorney for Petitioner)
7. Steve Dugan (Attorney for Petitioner)
8. United States of America (Respondent)
9. Humana, Inc. (former party)
10. Dr. Wesley L. Smith (employee of United States)
11. Jack Hood (Attorney for Respondent)

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OPINIONS BELOW

No previous opinion in this case has been reported either officially or unofficially. All opinions below are appended hereto. The case number in the United States Court of Appeals for the Eleventh Circuit was 83-8884, decided May 21, 1985.

STATEMENT OF JURISDICTION

The Petitioner herein seeks review of the order of the United States Court of Appeals, Eleventh Circuit, affirming the judgment of the United States District Court for the Middle District of Georgia. The order was entered on May 21, 1985.

The Petitioner made and filed her Petition for Rehearing En Banc on June 5, 1985. The Petition for Rehearing En Banc was denied on June 24, 1985.

Title 28, Section 1254(1), United States Code, grants this Court jurisdiction to review, by means of Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree by Federal Courts of Appeals, where any right is specifically set up under the Constitution of the United States. The Petitioner makes this Application for Writ of Certiorari, claiming that rights specifically given her by the Constitution of the United States have been denied her in the proceedings below.

Additionally, Petitioner claims that the decision of the lower Court is contrary to the following decisions of the Supreme Court of the United States: *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200; and *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141.

CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the Constitution of the United States, found at *USC Const. Amendment XIV, Section 1*: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *USCA Const., Amend. XIV, Sec. 1.*

STATEMENT OF THE CASE

A Complaint was filed on April 26, 1983, by the Petitioner herein, Brenda J. Rayner, for herself and her minor children, as widow and surviving children of SGT

Benton Ward Rayner, Jr., in the United States District Court for the Middle District of Georgia. The Defendant remaining in the subject of this Petition for Writ of Certiorari is the cause of action against the United States of America. Originally another Defendant, Humana, Inc., was designated, who answered, but who was dismissed as a party Defendant when it appeared that that corporation doing business in Georgia was not the same as the one to whom the deceased had been referred in the State of Kentucky. The Complaint alleged medical malpractice at the Ireland Army Hospital at Fort Knox, Kentucky in September and October, 1982, causing the death of the antecedent of the Petitioner. The United States duly answered the Complaint, and raised in its answer the *Feres* Doctrine. Subsequently, the United States filed a Motion to Dismiss, or in the Alternative for Summary Judgment which was granted by the lower Court on October 28, 1983. An appeal to the United States Court of Appeals, Eleventh Circuit followed. On May 21, 1985, that Court entered a decision affirming the decision of the lower Court. Petitioner duly filed her Petition for Rehearing En Banc on June 5, 1985, and that Court denied said Petition on June 24, 1985. This Petition for Certiorari follows that denial.

From May 1, 1982, until his death on October 7, 1982, SGT Benton Ward Rayner, Jr., was treated for lower back pain at Ireland Army Hospital at Fort Knox, Kentucky. On September 29, 1982, while SGT Rayner was on an off-duty medical hold status, the Army physician overseeing his care, Dr. Wesley L. Smith, CPT., M.D., recommended that SGT Rayner be transported the next morning as an out-patient to Humana Hospital-Audubon for the purpose of undergoing a myelogram.

However, Dr. Smith did not order SGT Rayner to undergo such a myelogram. Instead, SGT Rayner was told that he, himself, would have to make the decision as to whether or not he underwent the procedure. After being

briefed on the risks involved, SGT. RAYNER decided to have the myelogram, based on his understanding that he would receive non-negligent treatment from all of those responsible for the preparation, administration, and follow-up of his myelogram.

Once Dr. Smith received SGT Rayner's permission to go ahead, he arranged for SGT Rayner to be sent to Humana Hospital-Audubon to undergo a myelogram the following morning, September 30, 1982. However, Dr. Smith failed to direct that SGT Rayner be given any treatment or medications designed to prevent the type of deathly reaction to isotonic metrizamide—the contrasting agent used in the myelogram—which he later suffered. Furthermore, Dr. Smith's superiors and the staff of Ireland Army Hospital failed to sufficiently monitor and follow-up Dr. Smith's failure to prepare SGT Rayner for the myelogram in such a way as to minimize the risks of his developing the life-threatening reaction to isotonic metrizamide which later cost SGT Rayner his life.

On September 30, 1982, SGT. RAYNER was transported to Humana Hospital-Audubon, underwent a myelogram utilizing isotonic metrizamide, and was returned to Ireland Army Hospital. Upon his return, DR. SMITH issued written instructions that SGT. RAYNER was to be discharged the following day.

After being returned to Ireland Army Hospital, during the evening of September 30, 1982, SGT Rayner began experiencing and complaining of severe headaches, weakness, nausea, and vomiting, all of which are symptoms of a reaction to isotonic metrizamide which can become life-threatening unless properly treated. These symptoms persisted and Dr. Smith was informed of them when he made his visit to SGT Rayner's ward the following day, October 1, 1982. However, at that most critical life-or-death juncture, Dr. Smith negligently failed to commence the normal course of treatment—or any course of treatment at all—to arrest these symptoms and prevent

them from advancing to the point of taking the life of SGT Rayner.

Instead, Dr. Smith negligently sent SGT Rayner home, instructing him to return for a check-up in three weeks and telling him that these life-threatening symptoms were normal and had to run their course. In addition to his own negligence, this action bespeaks negligence on the part of Dr. Smith's superiors and the staff of Ireland Army Hospital, who negligently failed to assure that SGT Rayner receive competent follow-up care to an isotonic metrizamide myelogram and proper monitoring for the potentially life-threatening symptoms which he experienced in Ireland Army Hospital and which led to his death.

From October 1, 1982, the day he was discharged from Ireland Army Hospital, to October 5, 1982, SGT Rayner's reaction to isotonic metrizamide continued, but he and his wife relied on Dr. Smith's last word to him, that his severe headaches, weakness, nausea and vomiting were normal and had to run their course. Then, on October 6, 1982, SGT Rayner's condition worsened and SGT Rayner's wife called and left word for Dr. Smith to call her back. Dr. Smith's office told Mrs. Rayner it would give Dr. Smith the message and that he would return her call right away. However, he never did and, approximately two hours later while Mrs. Rayner was waiting for Dr. Smith's call, SGT Rayner went into seizures and episodes of biting his tongue. At this point, Mrs. Rayner called for an ambulance, which took SGT Rayner to the Ireland Army Hospital Emergency Room, where he suffered additional grand mal seizures. An hour later, Dr. Smith came to the Emergency Room and directed that SGT Rayner be placed in the regular medical ward, not the Intensive Care Unit. Later that afternoon, SGT Rayner went into prolonged seizures, and Dr. Smith called Mrs. Rayner and told her that he was taking SGT Rayner to the University of Louisville Hospital but that his condition was about

the same and that he would probably be in Louisville for three days and that she didn't need to go to the hospital herself. Upon his arrival at the University of Louisville Hospital, SGT Rayner was treated in the Emergency Room and transferred to the Intensive Care Unit. He died there in the early hours of the morning on October 7, 1982, due to intercerebral bleeding and cardiopulmonary arrest secondary to the bleeding caused by the failure to monitor the effects of the myelogram.

The Motion of the United States for a Summary Judgment, and the Affidavits supporting it do not contradict the alleged negligence of the military physicians involved.

The statements (Affidavits) submitted by the United States are contradictory on their face with regard to the duty status of SGT Rayner. The statement of Captain James Anthony indicates that the deceased was a Specialist Five and that he was assigned administrative duties from August 5, 1982 until his death on October 7, 1982, "in support of the alcohol and drug abuse prevention and control program at Fort Knox, Kentucky". The other Affidavits submitted by the United States, and all of the medical records atached to the Affidavit of Mrs. Rayner clearly indicate that the deceased was a Sergeant. Furthermore, the Affidavit submitted by the Government of Majorie Carney, the Medical Records Librarian at Ireland Army Community Hospital, Fort Knox, Kentucky, would be in total contradiction to an individual being assigned administrative duties in support of anything. It is quite obvious that SGT Rayner was a very ill person and according to the affidavit of Mrs. Carney, submitted by the United States, he was hospitalized from July 26, 1982, to August 26, 1982, "considered hospitalized" from August 26, 1982, to September 29, 1982, on a "holding status", hospitalized again on September 29, 1982, to October 1, 1982, and on October 1, 1982, to October 6, 1982, "returned to the status he held" from August 26, 1982, to September 29, 1982". None of this is consistent with

the impression the United States tends to portray both in its motion and in the Statement of Captain Anthony that SGT Rayner was in some way performing some military duties during the periods of time relevant.

The Petitioner contended in her appeal that the District Court erred in applying a rule of law, namely the *Feres* Doctrine and interpretations of same. Inasmuch as this is a Petition for Writ of Certiorari of a decision of the lower Court affirming the grant of Summary Judgment to the Defendant, all inferences most favorable to the Plaintiff-Appellee should be drawn from the Affidavits submitted of record.

ARGUMENT AND CITATION OF AUTHORITY

This Petition for Writ of Certiorari is for a review of the decision of the United States Court of Appeals for the Eleventh Circuit, affirming the Order of the lower Court granting summary judgment on behalf of the Respondent, the United States of America. The Supreme Court should review all evidence and inferences to be drawn from the statements and affidavits submitted below in the light most favorable to the Petitioner. *New Jersey Life Ins. Co. v. Gertz*, 622 F.2d 198 (6th Cir. 1980). In deciding whether to grant summary judgment the Court of Appeals should have drawn inferences most favorable to the party opposing the Motion and take care that no party will be improperly deprived of trial of a disputed factual issue; on review of a District Court's grant of summary judgment an Appellate Court should employ the same standards. *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210 (5th Cir. 1976). *Marshall v. Victoria Transp. Co., Inc.*, 603 F.2d 1122 (5th Cir. 1979), *F.S. Smithers & Co., Inc. v. Federal Ins. Co.*, 631 F.2d 1364 (9th Cir. 1980); *Beltz Travel Service, Inc. v. International Air Transport Ass'n*, 620 F.2d 1360 (9th Cir. 1980); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486 (8th Cir. 1976), cert. denied, 97 S.Ct. 239,

429 U.S. 887, 50 L.Ed.2d 168; *Weiss v. Kay Jewelry Stores, Inc.*, 1972, 470 F.2d 1259, 152 U.S. App. D.C. 350. On appeal from an entry of summary judgment the reviewing court should accept the version of the evidence of the party against whom judgment was entered. *Keiss v. Eason*, 442 F.2d 712 (7th Cir. 1971); *Lindley v. Amoco Production Co.*, 639 F.2d 671 (10th Cir. 1981); *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980).

The basic question before the Court is whether the long-standing *Feres* Doctrine is intended to preclude the hearing of a negligence action under the Federal Tort Claims Act involving a serviceman, who was acting outside of his line of duty and under circumstances which are neither related to nor hold any possible implications for military discipline. The United States contends that a medical malpractice action regardless of whether the serviceman was acting outside the line of duty and under circumstances which have no relationship nor hold any possible implications for military discipline is so barred.

In beginning the analysis of this question, we may look at the *Feres* decision itself, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152, the major related case that preceded it, *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 98 L.Ed. 1200, and the major related case that followed it, *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141.

In *Brooks*, the Court reversed the lower court and ruled that a member of the armed forces could recover under the Federal Tort Claims Act, stating:

> The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused

> by their service except in the sense that all human events depend upon what has already transpired.

Then in the *Feres* trilogy, the Court disallowed recovery by three service members, Feres, Jefferson and Griggs. But all can be distinguished from Rayner (the instant case), since Feres was injured while acting in the line of duty, Jefferson was required to undergo surgery, and Griggs was not excused from the chain-of-command and asked to decide independently to take the medical treatment which was negligently performed and led to his death.

Furthermore, in *Feres* the Court was careful to point out the distinction between it and *Brooks*, saying:

> The injury to Brooks did not arise out of or in the course of military duty. Brooks was . . . under compulsion of no orders or duty and on no military mission. . . . The government contended that there could be no liability to (Brooks), solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

This was followed by *Brown*, in which the Court allowed recovery for an injury characterized by Mr. Justice Black in his dissent as "inseparably related to military service" even though, he added, "But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury."

Furthermore, in the *Brown* decision the Court pointed out the *Feres* decision did not approve of the *Brooks* case, but merely distinguished it, citing "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline." In conclusion, the *Brown* decision stated:

> The present case is, in our view, governed by *Brooks*, not by *Feres*. The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline.

To summarize the Court's policy behind *Feres*, we may quote from *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980), which concluded as follows:

> The protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine. Although the Supreme Court has woven a tangled web in its discussions of the 'distinctly federal' notion and of the alternative compensation system, it has not wavered on the importance of maintaining discipline within the armed forces . . . only this factor can truly explain the *Feres* doctrine and the crucial line it draws . . ."

Thus, the "crucial line" which separates the *Feres* case from the non-*Feres* case is the impact of those cases on military discipline. The *Feres* doctrine attaches to cases of soldiers who are ordered to stay in barracks, like Feres, or who are required to have surgery, like Jefferson, or who are injured in the line of duty. But, *Feres* does not attach to cases where individuals are "under compulsion of no duty and on no military mission" or in situations "not analogous to that of a soldier injured while performing duties under orders" or victims of an "accident which had nothing to do with (their) army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired, like *Brooks* or Rayner.

Plaintiff submits that the *Feres* doctrine is an exception to the general rule of Federal Tort liability which the Court created out of concern, as the *Brown* decision states, for the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline." However, in special cases

such as Rayner and *Brooks*, where the maintenance of the suit holds no effect on military discipline, the policy behind *Feres* is no longer involved.

In fact, the policy behind *Feres* of preserving the structure and morale of military life can be positively served by Rayner's suit, since with no possible impact on discipline the only impact in this case will have on military life will be the extension of either protection or accountability to those who provide negligent and substandard medical care to members of our armed services, even to the point of causing their deaths.

Of course, the question arises as to why there have not been more cases involving servicemen to which the *Feres* Doctrine was held not to apply. Plaintiff submits that the answer is that, in military life, most cases do impact on discipline and thus do fall under the *Feres* policy. However, when that rare case comes along that is removed from disciplinary considerations, it should not be precluded from a fair hearing because the government wants to save money and routinely cites *Feres*.

Another example of such a case in which a Federal Court has held *Feres* not to apply is *Stephan v. United States*, 490 F.Supp. 323, D.C. Conn. 1980. That decision rested on the facts that the serviceman was injured at a place which was totally separate and distinct from the place at which he performed his regular duties, that he had not been compelled to perform the actions which led to his injury, and that he was under no compulsion to perform any military duty immediately before, during or after the injury. All those facts obtain in Rayner, but Rayner is even more compelling.

In Rayner, we have more than a case where an individual was injured outside the line of duty and far removed from his place of duty by both time and distance. We even have more than the fact that the Army "farmed out" his medical care in part to a civilian hospital and

then negligently failed to follow it up when he was returned to the Army Hospital. We have, in addition to that, the fact that Rayner was specifically told by his Army doctor that the military chain-of-command relationship was being temporarily terminated and that Rayner would have to decide for himself, without any orders forthcoming, whether to undergo a dangerous medical procedure.

What this case will decide is the basis upon which we will expect future servicemen in Rayner's position to make such a decision. With no direction from the chain-of-command, the only basis for such a decision must be the patient's understanding that he can expect competent, non-negligent medical care during the performance and the follow-up of the contemplated medical procedure. If that expectation is eroded by the knowledge that military physicians in such cases are held harmless for even fatal negligence, then such decisions become impossible to make. In other words, the rule of the Rayner case should be that once the military suspends the chain-of-command disciplinary relationship which exists between it and one of its members and disavows any responsibility for the decision which leads to the negligence involved, it cannot later avoid responsibility for its own negligence by citing a judicial doctrine that is grounded in the protection of military discipline.

The distinction in Rayner, then, is not the negligence but the responsibility for the decision from which the negligence resulted. If the Army Chain-of-Command had made the decision which set in motion the events during which Rayner was negligently treated, then this would be a *Feres* case. However, in a case like this where the Army's command structure did not make the decision which was set in motion the events during which Rayner was negligently treated, military discipline is not involved and *Feres* should not be applied.

CONCLUSION

In summary, it is respectfully submitted that the instant matter does not fall within the *Feres* exception to the general waiver of sovereign immunity under the FTCA and therefore this Court should grant this Petition for Writ of Certiorari, and the Judgment of the United States District Court should be reversed to grant a right of redress to the Petitioner on behalf of her decedent.

Respectfully submitted, this 20th day of August, 1985.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-8884

BRENDA J. RAYNER, for herself & minor children BRENTON S. RAYNER, CHRISTOPHER S. RAYNER & BBUCE S. RAYNER, as widow and surviving children of SGT. BENTON WARD RAYNER, JR.,

Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

May 21, 1985

Appeal from the United States District Court
for the Middle District of Georgia

Before TJOFLAT and JOHNSON, Circuit Judges, and DUMBAULD *, District Judge.

PER CURIAM:

This suit was brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C.

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* Honorable Edward Dumbauld, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

§§ 1346, 2671-2680 (1982), for the death of a serviceman allegedly caused by the doctors and staff of a military hospital. The district court granted summary judgment for the government. We affirm under the authority of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

Sergeant Benton W. Rayner, Jr. was serving on active duty with the United States Army at Camp Grayling, Michigan, when, on April 26, 1982, he was admitted to Mercy Hospital, Grayland, Michigan, with complaints of back pain. Due to his active duty status, he was transferred to Ireland Army Hospital at Fort Knox, Kentucky; he arrived at Fort Knox on May 1, 1982, and was placed under the care of Army physicians at that facility. The Army assigned Sergeant Rayner to a medical holding company during the course of his treatment at the Ireland Army Hospital. He continued to draw his full pay and remained on active duty subject to military discipline and orders.

After consulting with the Army doctor supervising his case, Sergeant Rayner elected to undergo a myelogram [1] on September 30, 1982, as an outpatient at Audubon Hospital, Louisville, Kentucky. Rayner returned to Ireland Army Hospital that evening and began complaining of severe headaches, weakness, nausea, and vomiting, all of which are alleged to be symptoms of a reason to isotonic metrizamide, the contrasting agent used in the myelogram. The Ireland Army Hospital staff failed to diagnose the alleged condition. The following day they sent him to his quarters and told him that the symptoms were normal and had to run their course. Sergeant Rayner's condition deteriorated, and on October 6, 1982, Sergeant Rayner's wife called her husband's physician.

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[1] A myelogram is a visualization or photograph of the spinal cord after injection of a radio-opaque substance into the spinal arachnoid space.

The doctor was unavailable but his office told her that he would return her call right away. Two hours later, while she was waiting for the doctor's telephone call, Sergeant Rayner experienced seizures and episodes of tongue biting. At this point, Mrs. Rayner called for an ambulance which took her husband to the Ireland Army Hosiptal Emergency Room where he suffered additional seizures which were diagnosed as grand mal seizures. An hour later, Sergeant Rayner's physician came to the emergency room and directed that Sergeant Rayner be placed in the regular medical ward, not the intensive care unit. Later that afternoon, Sergeant Rayner went into prolonged seizures, and his physician called Mrs. Rayner and told her that his condition had not changed and that he was taking her husband to the University of Louisville Hospital. The physician indicated that Rayner would probably be there for three days and that she did not need to accompany him. Upon his arrival at the University Hospital, Sergeant Rayner was treated in the emergency room and transferred to the intensive care unit. He died there in the early hours of the morning on October 7, 1982, due to intercerebral bleeding and cardiopulmonary arrest occasioned by the bleeding.

Sergeant Rayner's widow and children, the plaintiffs, brought this action for wrongful death against the United States pursuant to the FTCA. They alleged that the Army doctors could have prevented Sergeant Raynor's death through proper monitoring, diagnosis and treatment of his reaction to the isotonic metrizamide used during the myelogram procedure.

The district court granted summary judgment for the government because the alleged injury arose incident to military service and, thus, according to *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and its progeny, was not actionable under the FTCA.[2]

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[2] We note that "since a defense based on the *Feres* doctrine is premised on the notion that there is no jurisdiction to hear the

The plaintiffs appeal. They contend that the *Feres* doctrine is based principally on the potential negative "effects of the maintenance of [FTCA] suits on discipline, and the extreme results that might obtain if [such] suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty," *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954), and seek to distinguish their case from the usual *Feres* situation because Sergeant Rayner volunteered to undergo the myelogram, as opposed to being ordered by a superior to submit to the procedure. A suit, based on a serviceman's own election to receive medical attention, plaintiffs maintain, impacts neither the military discipline structure nor the chain of command relationship and, accordingly, is not foreclosed by the *Feres* doctrine. We disagree.

In the *Feres* case, the Supreme Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[3] 340 U.S. at 146, 71 S.Ct. at 159. Sergeant Rayner's case represents the typical *Feres* factual paradigm, "an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces." *Johnson v. United States*, 749 F.2d 1530, 1537 (11th Cir.1985). In this situation, the dis-

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claim as the United States has not waived sovereign immunity for that kind of suit, such [a defense] should be raised by a motion to dismiss for lack of subject matter jurisdiction." *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981); *see also Johnson v. United States*, 749 F.2d 1530, 1532 n. 2 (11th Cir. 1985). It follows that a court which accepts the *Feres* doctrine defense should label its dispositive order as a dismissal for lack of jurisdiction, as opposed to a summary judgment, which connotes a decision on the merits. Id.

[3] *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), provides a comprehensive summary of the evolution of the *Feres* doctrine.

trict court need only decide whether the injury arose out of or during the course of an activity incident to service in the Armed Forces. *Id. See also United States v. Brown*, 348 U.S. 110, 113, 75 S.Ct. 141, 144, 99 L.Ed. 139 (1954).

The provision of benefits to soldiers because of their status as military personnel is considered "activity incident to [such] service." *Brown v. United States*, 739 F.2d 362, 368 (8th Cir.1984); *Johnson v. United States*, 704 F.2d 1431, 1438 (9th Cir.1983). Military medical care constitutes such benefits; accordingly, suits by servicemen or their representatives for medical malpractice are barred by the *Feres* doctrine. *See, e.g., Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); *Jones v. United States*, 729 F.2d 326, 328 (5th Cir.1984); *Joseph v. United States*, 505 F.2d 525 (7th Cir.1974); *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir.1974), *cert. denied*, 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1975); *Peluso v. United States*, 474 F.2d 605 (3d Cir.), *cert. denied*, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973). In *Shults v. United States*, 421 F.2d 170, 171-72 (5th Cir.1969), we affirmed the district court's dismissal of a sailor's medical malpractice suit against the government, stating in part:

> it is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of treatment had to be "in the course of activity incident to service."

The result, here, is not altered by the fact that Sergeant Rayner chose to undergo the particular course of treatment, the myelogram, rather than being ordered to do so. Elective medical procedures, like elective surgery, are

"incident to service" for purposes of the *Feres* doctrine. *Alexander v. United States*, 500 F.2d 1, 4 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107, 95 S.Ct. 779, 42 L.Ed.2d 803 (1975); *Lowe v. United States*, 440 F.2d 452, 453 (5th Cir.), *cert. denied*, 404 U.S. 833, 92 S.Ct. 83, 30 L.Ed.2d 64 (1971). The judgment of the district court is, accordingly,

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBIA DIVISION

Civil Action No. 83-93-COL

BRENDA J. RAYNER, for herself and minor children BENTON S. RAYNER, CHRISTOPHER S. RAYNER, and BRUCE S. RAYNER, as widow and surviving children of SGT. BENTON WARD RAYNER, JR.,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

[Filed Oct. 28, 1983]

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a medical malpractice action brought under the Federal Tort Claims Act by the widow of Army Sergeant Benton W. Rayner, Jr., the negligence alleged having been incident to his treatment at Ireland Army Hospital, Fort Knox, Kentucky. The Defendant has filed a motion for summary judgment and a brief and supplementary matter in support of the motion. The Plaintiff has filed a brief and supplementary matter in opposition to the motion, all of which have had the Court's consideration.

It clearly appears that at all times referred to in the Plaintiff's complaint Sgt. Rayner was on active duty in the United States Army and was subject to military discipline and orders. Stated otherwise, it is clearly a fact that except for his military status Sgt. Rayner would not have been in the military hospital in the first place. This being true, any act of negligence that may have allegedly occurred resulting in injury to him while he was in the military hospital would have been incident to his military service and could not be the basis for recovery under the Federal Tort Claims Act. *Feres v. United States*, 340 U.S. 135 (1950); *Shults v. United States*, 421 F2d 170 (5th Cir. 1979). The fact that Sgt. Rayner was allowed to decide whether he wanted to undergo the medical procedures involved would not lead to a different conclusion. *Lowe v. United States*, 440 F2d 452 (5th Cir. 1971).

The doctrine established in *Feres* also bars a suit by a service person's next of kin for damages resulting from the death or injuries to the service member if the death or injuries are incident to service. *Shaw v. United States*, 448 F2d 1240 (4th Cir. 1971).

Consistent with the foregoing, the Court determines that the Defendant's motion for summary judgment should be and the same is hereby sustained and judgment will be entered accordingly.

IT IS SO ORDERED this 28th day of October, 1983.

/s/ J. Robert Elliott
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBIA DIVISION

Civil Action No. 83-93-COL

BRENDA J. RAYNER, for herself and minor children BENTON S. RAYNER, CHRISTOPHER S. RAYNER and BRUCE S. RAYNER as widow and surviving children of SGT. BENTON WARD RAYNER, JR.,

Plaintiff

v.

UNITED STATES OF AMERICA

[Filed Oct. 28, 1983]

JUDGMENT

Pursuant to Memorandum and Order dated and filed on October 28, 1983, and for the reasons stated therein, the Defendant's Motion for Summary Judgment is sustained and Judgment is therefore entered in favor of the Defendant.

This 28th day of October, 1983.

GIRARD W. HAWKINS
Clerk

By /s/ Louie G. Broodwell
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8884

BRENDA J. RAYNER, for herself & minor children BRENTON S. RAYNER, CHRISTOPHER S. RAYNER & BBUCE S. RAYNER, as widow and surviving children of SGT. BENTON WARD RAYNER, JR.,

Plaintiff-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 21, , 11 Cir., 1985, —— F.2d ——)
(June 24, 1985)

Before TJOFLAT and JOHNSON, Circuit Judges, and DUMBAULD *, District Judge.

PER CURIAM:

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* U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald A. Tjoflat
United States Circuit Judge